United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-7463

United States Court of Appeals

FOR THE SECOND CIRCUIT

FOOTNER & CO., INC., et al.,

Plaintiffs,

against

SS AMAZONIA, her engines, etc. COMPANHIA DE NAVEGACAO MARITIMA NETUMAR, et al.,

Defendant-Appellant and Third-Party Plaintiff,

and against

NEW JERSEY EXPORT MARINE CARPENTERS INC.,

Third-Party Defendant-Appellee.

COMPANHIA DE NAVEGACAO MARITIMA NETUMAR,

Plaintiff-Appellant,

against

UNITED TERMINALS, INC.,

Defendant,

NEW JERSEY EXPORT MARINE CARPENTERS, INC.,

Defendant-Appellee.

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CICHANOWICZ & CALLAN
Attorneys for Appellant
80 Broad Street
New York, New York 10004
(212) 344-7042

DONALD B. ALLEN
PAUL M. KEANE
Of Counsel

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POINT I

The burden of proof.

Respondent relies on the trial court's conclusion that the vessel owner did not prove what caused the Terexes to

break loose. That reliance is misplaced since the legal reasoning is faulty. Terex tractors secured by professional lashers do not normally break loose in moderate weather, shortly after leaving port. When they do, it develops upon the person who secured them, and who supplied all the gear, to overcome a presumption of fault. The vessel owner is not required to prove the specific chain of events leading to the disaster. Almost all of the broken stowage cases take place below decks without any eye-witnesses.

As stated by Judge Weinfeld in *Klepel* v. *Pennsylvania Railroad Company,* 129 F.S. 668, aff. 229 F. 2d 910 (S.D. N.Y., 1955),

> 'The essential elements of his claim, as to which he has the burden of proof, may be established by circumstantial as well as direct evidence. Circumstantial evidence is on no different or lower plane than other forms of evidence. A plaintiff is not required to establish the specific cause of the accident or to eliminate every remote possibility that it might have been due to some cause other than the defendant's negligence. 'It is enough that he shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred.' "
>
> *Ingersoll* v. *Liberty National Bank of Buffalo,* 278 N.Y. 1, 14 N.E. 2d 828, 830; see also *Stubbs* v. *City of Rochester,* 226 N.Y. 516, 124 N.E. 747, 5 A.L.R. 1396 (cited as footnote number 4 in opinion)
>
> (p. 670)

The same mistake made by by this trial court was encountered in the Tenth Circuit where the Court of Appeals said:

> "Apparently quite apart from the time element as an intervening cause, the trial court did not think the plaintiff proved the issuable fact that the defective weld caused the derrick to collapse as it did. There was no

direct evidence of proximate cause, and indeed there need not be, for proximate cause is often left to permissible inferences from established facts. (citing cases)"

Pryor v. *Moore,* 262 F. 673, 675 (10th Cir., 1958).

In *The Mormackite,* 272 F. 2d 873, cert. den. 362 U.S. 990 (2d Cir., 1960), the shifting cargo in seasonable weather created an inference that the stowage was faulty. In a similar cargo shifting situation the Exchequer Court of Canada held:

"All that is necessary for the plaintiff to prove in this case is that on the balance of probabilities the damage was caused by defective stowage. That is a reasonable deduction from the evidence."

Lake Bosomtwe, 1969 A.M.C. 2233.

The circumstance evidence in this case is strongly supported by the further fact that respondent was in complete charge of lashing and securing; it supplied all of the lashing gear, some of which was defective and parts of which were sub-standard; and cargo secured by this same respondent gave way in three other areas.

POINT II

Respondent's admission of improper lashing

Respondent contests an earlier admission that the Terex tractors were improperly secured in that there was no blocking under the axles, and the securing wires were led out horizontally to the ship's sides instead of down to the deck. It argues that the president's sworn answers contain "no statement" as to the absence of blocking. We urge this court to read the interrogatory and the detailed answer which appear at pages 102 and 105 of the Appendix because it leaves no doubt as to the absence of blocking.

Respondent also says the court simply accepted the carpenter foreman's version over that of the president. There is no such finding. Furthermore, the president's sworn answers were prepared and served by respondent's counsel only *after* the carpenter had given his version to the same attorney (A206-7). Even when the specific answer was pointedly placed in evidence, the author was never called to correct it (A142-3).

The most astonishing part of respondent's argument is a statement that appellant's counsel had interviewed the carpenter and knew what his testimony would be. As the record clearly shows, the trial testimony was entirely different from what we had been told during the interview (A216-19).

POINT III

The alleged proof of proper lashing

The only evidence cited to support a finding that the Terex tractors had been properly lashed was the National Cargo Bureau certificate. Thus, if the certificate does not so state, there is only an unwarranted and unsupported conclusion because the surveyor did not testify. Only the certificate and the surveyor's notes were available and they are clear and concise.

The critical notes are those of January 18, the day the Terexes were loaded and the ship sailed. Since blue ink fades in the reproduction process, we show below the complete notes for Holds 1 and 2 on January 18, together with our explanation of these notes:

From Exhibit 108	*Our Explanation*
1/18/71 Clear	Weather Clear
No. 1 L/H F/sq copper	No. 1 Lower Hold, Forward Square [illegible]
Cigars—A/SQ Pipe	Cigars—Aft Square—Pipe
Dunn FL over C/S Gen	Dunnage flooring over cases of Generals
No. 2 Closed O/Hatch	No. 2 closed, on hatch
2 40′ Conts F/A Set On Dunnage	Two 40 foot containers stowed fore and aft, set on dunnage
Lashed Both Ends 2 Part 5/8″ Wire 3/4″ Tbls to D/H/F	Lashed at both ends with two parts of 5/8″ wire and 3/4″ turnbuckles to deck-house forward
O/D S 1 x 20′ Cont	On-deck starboard side, one 20 foot container
Set on Dunn	Set on dunnage
X 2 Part 5/8″ Wire	Two parts of 5/8″ wire
Lash 3/4″ Tbls to P/E on	Lashed on 3/4″ turnbuckles to port side or
Cap Rail O/Deck	Cap rail on deck.

(A99)

One may challenge this translation but it cannot be disputed that there was no observation of the Terexes on January 18, the only day they could have been seen*.

This is the only evidence cited by the trial court to support a finding of proper lashing. It adds nothing to show that an inspection was physically possible when the evidence clearly shows it was never made. Nor is there any

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* The unboxed tractors mentioned in the final certificate refer to conventional tractors carried in the lower hold (A. 17, 197).

merit in respondent's allegation that "obviously" the trial judge was also relying on the testimony of the carpentry foreman. The court made no such finding. And the fact that the ship's officers did not object is also irrelevant. As earlier noted on page 5 of our main brief, the Supreme Court has held that the shipowner's failure to discover cannot be a bar to recovery.

POINT IV

Respondent was also responsible for newsprint stowage

The trial court speculated that rolls of newsprint could have gotten loose, without realizing that this same respondent did the final securing of the paper as well as the Terex tractors. It is conceded that 15 additional tons of newsprint* were placed in the No. 2 'tween deck at New York. Despite an unsupported assertion to the contrary, respondent was responsible for lashing and securing *all* cargo loaded at New York (A 25-6, 122, 215), and thus would be at fault for any paper movement.

Respondent also contends that any such movement would have been at the forward end where it would affect the Terexes, citing the trial testimony of two expert stevedores. The testimony of each one of the every pages cited is revealing. Keeler testified in answer to respondent's query:

> "Q. Assuming that the cargo was stowed, as I have asked you to assume, with the newsprint going all across the vessel and forward of the newsprint tractors end to end on the burton were located and forward of that are containers and rubber and cartons, and assume that newsprint stow broke loose and the rolls

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* Our Main Brief erred in saying it was 65 tons.

came down, would you conceive it to be possible that the rolls striking any one of these lashings could part the wire or damage the integrity of the stow?

A. Not if the tractors were lashed properly."

(A 147)

Respondent's expert, Wheeler, testified under direct examination:

"Q. Bearing in mind the paper in No. 1 shifted, are you able to make any conclusion as to whether paper in No. 2 or heavy lifts in No. 2 shifted first?

A. No, sir, I couldn't say which one shifted first.

Q. Do you believe anybody could?

A. No one could say which one shifted first, unless someone happened to be down there at the time."

(A 234)

In summary, there was absolutely no basis for speculation concerning the newsprint but if this court should consider it a factor, it was respondent which failed to properly re-secure the paper.

POINT V

Diversionary argument

The remainder of respondent's brief is an attempt to duplicate its success before the trial court in diverting attention from the major issue in this case by protracted comment on extraneous matters such as heavy weather, fire, etc. We comment briefly, to avoid any claim that such charges could not be answered.

This was not a case which turned on the demeanor of the witnesses. The one and only live witness who described the lashings was the carpenter foreman, and the trial court did not even mention his testimony. Respondent's employees who did the lashing were never called.

The chief mate had an unidentified illness which caused him to leave the vessel at Bermuda and eventually, his death. There is no evidence that it prevented him from attending to his duties, or that other officers were unable to fill in, if necessary. The only duty relevant to this case was to check the lashings before the storm struck and the trial court found that this was done (A8).

A surveyor, Sherriff, conceded the possibility that a bulkhead staple could have given way before the lashings. Respondent asserts, improperly, that the Terexes were secured to one of them which had actually pulled loose on a prior voyage. The clear proof is that the only damaged links were on the forward bulkhead behind some containers, where they could not have been used in lashing the Terexes (Ex. 80).

Bits and pieces of evidence are again used to buttress a claim that there was a fire during the voyage. Unanswered is our query as to what earthly difference a fire on deck would make in determining whether the Terex tractors below deck had been properly secured. The only suggestion (without any evidence) is that it may have been a distraction which prevented hearing the loose tractors pound against the ship's sides. Again, we ask what difference would that make, *after* the Terexes had burst their bonds and were crashing about the hold?

A detrimental inference is attempted because the chief mate's stability calculations could not be produced. The calculation is not a permanent record, and the mate's untimely death prevented him from testifying. The accusation should come with ill grace from one who deliberately chose not to produce the president who swore to the manner of loading, the superintendent who oversaw the job, the foreman of the lashers, or any of the eight lashers.

Finally, there are a series of references to so-called differences between the deck and engine logs. The only

purpose would seem to be to divert attention from the integrity of the lashings. The logs have no relevance and are of no aid to this court on that issue.

Conclusion

Respondent's brief is essentially an attempt to infer necessary findings and legal conclusions which the trial court never made, and to divert attention from the undisputed facts and the overwhelming body of law which requires compensation when a professional marine service contractor clearly fails to honor its warranty of workmanlike service. The decision of the court below should be reversed.

Respectfully submitted,

CICHANOWICZ & CALLAN
Attorneys for Appellant
80 Broad St.
New York, N. Y. 10004

DONALD B. ALLEN
PAUL M. KEANE
Of Counsel

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Due and timely service of TWO copies of the within BRIEF is hereby admitted this 11TH day of JANUARY 1977

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Attorneys for APPELLEE